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# In the Supreme Court of the United States

**October Term, 1981**

SUNTEX DAIRY, ET AL., *Petitioners,*

vs.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE OF THE UNITED STATES, *Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GARY REAGAN GURWITZ
JOHN BALLARD BENNETT
*(Counsel of Record)*
ATLAS AND HALL
P. O. Drawer 3725
McAllen, Texas 78501
(512) 682-5501
*Attorneys for Petitioners*

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3090

## QUESTIONS PRESENTED

1. Whether under the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. §601 *et seq.*) the Fifth Circuit correctly held that in this suit the Secretary of Agriculture's determinations (1) that the lack of handler approval tended to prevent the effectuation of the declared policy of the Act and (2) that the issuance of milk marketing order was the only practical means pursuant to the declared policy of the Act of advancing the interests of the producers:

   (a) were agency actions entrusted to the Secretary's unlimited discretion, and

   (b) were not subject to judicial review on either the "substantial evidence" standard or the "arbitrary, capricious or abuse of discretion" standard, or on both standards, and

   (c) could be judicially reviewed only for "procedural irregularity or fraud"?

2. Whether, in determining that six separate federal milk marketing orders should all be merged into a single order, the Secretary of Agriculture could include the Corpus Christi Order, one of the separately existing orders, into the merged order even though he found it had little intermarket relationship with some of the other orders to be merged, based on the proposition that an extensive interfacing of one market with each of the other five markets was not necessary?

## LIST OF ALL PARTIES

The parties to this proceeding are as follows. The Petitioners are Suntex Dairy, Schendel Jersey Farms, Cliston V. Harborth, Harley R. Broadwater, Welton Gorbet, Knolle Cattle Co., A. R. Solomon, Ernesto Villarreal, Jr., Vicente Saenz, Roberto Villarreal, Johnson Jersey Farm, Jess R. Richter, C & H Farms, Galloway Dairy Farms, Inc., Bill Richter, Jr., Mrs. E. L. Reynolds, Robert G. Spear Farm, Creekside Jersey Farm, P. F. Wied, Clarence F. Schendel, Lyssy Dairy Farms, Knolle Jersey Farm, H. P. Knolle Farms, Welton Knolle, R. E. Knolle, Sandia Agricultural Enterprises, Southwest Dairy, Inc., and Hygeia Dairy Company. In compliance with Rule 28.1, Rules of the Supreme Court, a listing of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each corporate Petitioner is as follows: Cohyco, Inc., is the parent company of Petitioner Hygeia Dairy Company, owning all of its stock.

The Secretary of Agriculture of the United States, John R. Block, is the Respondent. These were all of the parties to this case in the United States Court of Appeals for the Fifth Circuit. However, both the Fifth Circuit and the United States District Court permitted Associated Milk Producers, Inc., to file an *amicus curiae* brief in support of the Secretary of Agriculture and heard oral argument from its counsel.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, Suntex Dairy, et al., respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals is reported as *Suntex Dairy v. Block*, 666 F.2d 158 (5th Cir. 1982), and appears in the Appendix hereof as Appendix A. (A1-A20.) The opinion of the United States District Court for the Southern District of Texas dated August 4, 1980, is not reported and appears as Appendix B hereof. (A21-A28.) An opinion of the United States Court of Appeals in a prior appeal in this cause is reported as *Suntex Dairy v. Bergland*, 591 F.2d 1063 (5th Cir. 1979),

and appears as Appendix C. (A29-A42.) In regard to such prior appeal, the opinion of the United States District Court for the Southern District of Texas dated January 28, 1977, is not reported and appears as Appendix D. (A43-A52.) Involved in this suit is the Decision on Proposed Amendments to Marketing Agreements and to Orders dated May 2, 1975, and the accompanying Order Amending and Merging the Orders, published May 7, 1975, in the Federal Register, Volume 40, page 20,004 *et seq.* (Appendix E at A53-A223). The subsequent Order Amending and Merging Orders dated May 28, 1975, was published in the Federal Register of May 30, 1975, Volume 40, page 23,437 *et seq.* (Appendix F at A224-A304.)

## JURISDICTION

The judgment of the Court of Appeals was entered January 21, 1982. (Appendix G at A305.) A timely petition for rehearing and a suggestion for rehearing en banc were denied February 17, 1982 (Appendix H at A306, A307), and this petition for a writ of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## STATUTES INVOLVED

This case involves the Agricultural Marketing Agreement Act of 1937, the pertinent portions of which, 7 U.S.C. §§602, 608b and 608c, are reprinted in Appendix I. (A308-A337.) Also involved and reprinted in Appendix I are 5 U.S.C. §§701 and 706. (A337-A339.)

## STATEMENT OF THE CASE

The Petitioners brought this suit in the United States District Court, Southern District of Texas, against the United States Secretary of Agriculture. They complained of the Texas Marketing Area Milk Market Order which terminated or abolished six separate milk marketing orders, including the Corpus Christi Order and which merged into a single order the areas previously included within the six orders, plus some additional areas. Prior to the promulgation of the challenged Order in 1975, the Petitioners, who are independent milk producers, were in the Corpus Christi Federal Milk Marketing Order. Under the merged Order the Petitioners receive a lower minimum or "blend" price for their milk than they received under the separate Corpus Christi Order. (App. A at A4-A8.)

In the promulgation process of the Order in question, a public hearing was held and a substantial amount of evidence submitted. Thereafter, the Secretary considered the hearing record and made extensive findings, one of which was that the proposed Order tended to effectuate the declared policy of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. §601 *et seq.* (the "Act"). A few weeks later, the same finding was recited in connection with the final Order. (App. E at A217, A221; App. F at A225.) In the final Order the Secretary also recited determinations that lack of handler approval of a marketing agreement tended to prevent the effectuation of the declared policy of the Act and that the issuance of the new Order was the only practical means pursuant to the declared policy of the Act of advancing the interests of the producers. (App. F at A226.)

The Petitioners sued the Secretary charging, *inter alia*, that the "tended to effectuate" finding, the "only practical

means" finding and the "tended to prevent the effectuation" finding, insofar as they related to the part of the new Order terminating the Corpus Christi Order, were not supported by substantial evidence and said findings and Order were arbitrary, capricious and constituted an abuse of discretion.[1] The jurisdiction of the District Court was invoked under 28 U.S.C. §1331.[2] Also invoked were 5 U.S.C. §§702, 703 and 704. Petitioners prayed that the Order in question be in all things set aside, or, in the alternative, that the Corpus Christi Order not be included within the Texas Marketing Area Order, and further, that Petitioners recover damages.

The District Court, after first staying the implementation of the new Order as it applied to the Corpus Christi Order, entered an agreed order which lifted the stay on condition that if the new Order is held to be invalid and if Petitioners establish that they are entitled to damages because of such Order, such damages will be paid out of the producers settlement fund of the new Order. (App. D at A44.) The District Court granted the Secretary's motion for summary judgment, holding that Petitioners did not have standing to seek judicial review on the substantive merits of the Secretary's determinations that a new Order should be promulgated. (App. D at A45-A49.) The United States Court of Appeals for the Fifth Circuit reversed and

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1. The Petitioners also averred that the referendum of producers held in connection with the promulgation of the new Order was improperly conducted because a large milk marketing cooperative, Associated Milk Producers, Inc., was allowed to vote as a bloc all of the votes of the producers that constituted its members in violation of an antitrust injunction previously entered by a United States District Court in Missouri.

2. In its opinion the District Court commented: "The District Courts of the United States are vested with jurisdiction to review the Secretary of Agriculture's rulings made in response to objections to the orders issued by him. 7 U.S.C. §608c(15)(B)." (App. B at A23, footnote 3.)

remanded, ruling that Petitioners, as milk producers, did have standing to bring this substantive attack on the Order.[3] (App. C at A35-A40.)

Upon remand the District Court again granted judgment in favor of the Secretary. The Court held that the evidence supporting the Secretary's decision to merge the six orders was substantial and that the Secretary's conclusion that a single order was "the most appropriate method" of effectuating the declared policy of the Act was reasonable in light of the record as a whole. The District Court further held that the Secretary's findings that the failure of the requisite percentage of handlers to sign the marketing agreement tended to prevent the effectuation of the declared policy of the Act and that issuance of the Order was the only practical means of advancing the interests of the producers in the area were supported by substantial evidence. (App. B at A21-A27.)

On Petitioners' second appeal, the Fifth Circuit held that the Secretary's determination that the milk Order in question tended to effectuate the policy of the Act was supported by substantial evidence and was not arbitrary, capricious or an abuse of discretion. (App. A at A9-A10.) The Court also ruled that the Secretary's determinations that the lack of handler approval tended to prevent the effectuation of the declared policy of the Act and that the issuance of the Order was the only practical means of advancing the interests of the producers were agency actions entrusted to the Secretary's unlimited discretion. Such determinations, the Court held, could not be reviewed on the grounds that they were unsupported by

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3. The Fifth Circuit also held that even if the bloc voting of Associated Milk Producers, Inc., may be held to have violated the terms of the Missouri District Court injunction this federal marketing order could not be invalidated on that ground. (App. C at A40-A42.)

substantial evidence or were arbitrary, capricious or an abuse of discretion, though such determinations could be reviewed for "procedural irregularity or fraud". (App. A at A10-A20.)

## REASONS FOR GRANTING THE WRIT

Petitioners submit that in this case the United States Court of Appeals for the Fifth Circuit decided important issues of statutory construction not heretofore specifically determined by this Court. Petitioners further submit that the Fifth Circuit in its decision failed to adhere to the teachings of *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

The subject of the present case, the Agricultural Marketing Agreement Act of 1937, unquestionably is federal legislation which affects virtually all areas of the nation and vast segments of the population. In the realm of milk marketing alone the Act significantly impacts a myriad of handlers and producers, as well as millions of consumers of liquid milk and milk products. It is, therefore, patent that the proper determinations of the questions involved in this case are of substantial importance to the United States and in particular to its agricultural economy.

### I.

**The Determinations Of The Secretary Made To Overcome Lack Of Handler Approval Under 7 U.S.C. §608c (9) Were Not Made In Accordance With The Statutory Scheme And Requirements, And Judicial Review Of Such Determinations Is Not Limited To "Procedural Irregularity Or Fraud", Contrary To The Holding Of The Fifth Circuit.**

The Fifth Circuit opened the portion of its opinion devoted to the determinations made by the Secretary to

overcome lack of handler approval with the observation that it involves "an issue of first-impression statutory interpretation." (App. A at A10, A11.) Petitioners agree that this is an accurate assessment of the dearth of court authority directly bearing thereon. However, Petitioners believe that the Fifth Circuit has misconstrued the Agricultural Marketing Agreement Act of 1937 and bestowed upon the Secretary plenary discretion not contemplated by the provisions of this legislation.

In Petitioners' view what the Fifth Circuit has done is to substantially eviscerate the requirements set forth in 7 U.S.C. §608c(9). Under Subsection 9 of §608c (App. I at A327-A329) a proposed order cannot become effective, upon the refusal or failure of the handlers accounting for more than 50 percent of the volume in the area to sign a marketing agreement, unless the Secretary determines that such failure or refusal tends to prevent the effectuation of the Act's declared policy and also that the issuance of such order is the only practical means of advancing the interests of the producers. Subsection 9, in addition, requires at least two-thirds producer approval, but the same amount of producer approval is required whether or not handler consent is obtained. Compare §608c(8)(A&B) with §608c(9)(B)(i&ii).

Subsection 3 of §608c (App. I at A313) directs that a hearing be held on a proposed order when the Secretary has reason to believe that the issuance of an order will tend to effectuate the declared policy of the Act. Subsection 4 of §608c (App. I at A313) refers to the making of certain findings by the Secretary upon evidence introduced at the hearing.

Largely on the basis of Subsections 3 and 4, the Fifth Circuit labeled the required hearing the "tendency" hear-

ing (App. A at A6, A7), but that is at least a partial misnomer. Consider the text of Subsection 4:

> "Finding and issuance of order (4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity."

Petitioners offer that the phrase "in addition to such other findings as may be specifically required by this section" refers to the Subsection 9 findings in question. Thus, while the hearing does pertain to the question of whether the proposed order will tend to effectuate the Act's declared policy, it also pertains to the Subsection 9 findings—tends to prevent the effectuation of the declared policy (A); and issuance is the "only practical means" (B).

However, Subsection 4 aside, there is no suggestion in Subsection 9 that the Secretary's determinations are not to be based on evidence taken at the prior hearing; and wording in Subsection 9 affirmatively links a previous hearing with the required determinations. (Also see Subsection 10, App. I at A329.) Regarding what the Court of Appeals chose to call the "tendency" hearing, the Secretary recited in the pertinent Decision on Proposed Amendments to Marketing Agreements and to Orders as follows:

> "A public hearing was held upon proposed amendments to the marketing agreements and the orders regulating the handling of milk in the aforesaid marketing areas." (App. E at A53).

This passage reflects that the lengthy hearing was not solely a "tendency" hearing, for matters involving both orders and marketing agreements were involved. (See also 7 U.S.C. §608b, App. I at A310.)

But even if it were assumed that the determinations in question are not to be based on evidence received at the original hearing or some subsequent hearing, still there is no indication whatever that these determinations were intended to be left to the unfettered discretion of the Secretary so that they would be immune from judicial review to at least ascertain if they were arbitrary, capricious or an abuse of discretion.

Below, the Secretary pressed upon the Fifth Circuit the following:

> "When Congress selected the language in the Agricultural Marketing Agreement Act of 1937, it was bound and determined to protect producers. Viewed in the context of this Congressional purpose, the Secretary's Section 8c(9) determinations are essentially ministerial and his determination under that Section that the order should become effective if producers approve is not subject to judicial review. Once the Secretary finds that the requisite number of handlers have failed to sign marketing agreements he then seeks to enter the order without their acquiescence since that is the 'only practical means' left open to him to advance the interests of the affected producers. The Secretary has interpreted his responsibilities under the statute in this manner since its enactment and has consistently followed this course of action. *See, e.g., Rock Royal, supra; H. P. Hood & Sons v. United States,* 307 U.S. 588, 591-93 (1939). (Footnote omitted.) This long-standing agency construction is entirely logical and is entitled to great deference. (Authorities omitted.)" (Secretary's Fifth Circuit Brief at 39, 40.)

Petitioners offer that when Subsections 3, 4, 8, 9 and 10 of §608c are examined and juxtaposed they do not reflect a statutory scheme which bestows upon the Secretary "administrative absolutism" regarding his Subsection 9 determinations. Rather, they reflect a Congressional call for multiple decisions after and flowing from a hearing or hearings, especially if the order is to be effectuated without handler approval. Furthermore, even if the Subsection 9 determinations were not intended to be based upon a hearing record, they were clearly intended by Congress as significant checks upon the exercise of the Secretary's power to promulgate a marketing order; and judicial review should be available on the question of whether the Secretary's decisions were arbitrary, capricious or an abuse of discretion, if not on the substantial evidence test. (5 U.S.C. §706(2), App. I at A338, A339.) The Fifth Circuit's decision, if allowed to stand, effectively pulls two of the "teeth" which Congress inserted into this Act.

The Court of Appeals recognized that this statutory scheme authorized a review of the Secretary's "tends to effectuate the declared policy" determination on a substantial evidence standard and/or an arbitrary and capricious standard. (App. A at A9, A10.) In attempting to differentiate this "tendency" determination from the "tends to prevent" determination of Subsection 9, the opinion reasoned that if the Secretary can determine that an order tends to effectuate the policy of the Act it follows that failure of handlers to approve such a marketing arrangement prevents the effectuation of the Act's policy. (App. A at A13.) Petitioners do not find that these two administrative decisions are, in effect, synonymous and, therefore, do not consider that Subsection 9(A) is merely a Congressional redundancy.

And what of the "only practical means" determination required in Subsection 9(B)? Obviously, to ascertain that a proposed order would tend to effectuate the declared policy is not the same as determining that its issuance is the only practical means of advancing the interests of the producers. More is needed to confirm that a course of action is the "only practical means" than to confirm that it is simply one reasonable means. The Fifth Circuit's opinion did not specifically address itself to the large question of why Congress would intend that the Secretary make his "tendency" decision based on a hearing record but that the more stringent "only practical means" determination be left to his unlimited discretion and not subject to review except for "procedural irregularity or fraud".

In taking the position that the Subsection 9 determinations "are essentially ministerial" and not subject to review, the Secretary maintained that he "has interpreted his responsibilities under the statute in this manner since its enactment and has consistently followed this course of action." (Secretary's Fifth Circuit Brief at 39, 40.) The Court below agreed that this is what has been happening since the Act was enacted. (App. A at A15.) The Court and the Secretary both pointed to *United States v. Rock Royal Co-Op*, 307 U.S. 533, 547 (1939), and to *H. P. Hood & Sons v. United States*, 307 U.S. 588, 592 (1939), as reflecting that the Act has been so administratively construed and administered. Petitioners find that the descriptions of the administrative practices contained in these decisions do not reveal that the Secretary was making these determinations on a "ministerial" or an "automatic" or a "wholly discretionary" basis.

If the Secretary's assertions to the Fifth Circuit are taken on their face, once the requisite amount of producer

approval is obtained, the Secretary can and does proceed to effectuate the proposed order without further reflection or discretionary encumbrance. Petitioners contend that such a practice by the Secretary constitutes a failure to follow the mandates of this statutory scheme. Hence, the Order in question was not made and issued in accordance with law and judicial review is not only appropriate but urgently required. This Court recognized in *Morris v. Gressette*, 432 U.S. 491, 501 (1977), that judicial review of a final agency action should not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. No such Congressional purpose is expressed, nor can it reasonably be implied, in regard to the determinations herein involved.

In considering the exclusions from judicial review specified in 5 U.S.C. §701(a) (App. I at A337), the Court below determined that there is no explicit preclusion of judicial review of the questioned decisions by the Secretary, but it indicated that they are "committed to agency discretion by law". While the opinion recited that in *Citizens to Preserve Overton Park v. Volpe, supra*, 401 U.S. 402 (1971), this Court cautioned that such exception to judicial review is "very narrow" and said that it is applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is "no law to apply", Petitioners feel that the Fifth Circuit either largely ignored or plainly misapplied the *Overton Park* rationale in arriving at its decision. In so doing, the Administrative Procedure Act's "generous review provisions" were not accorded the "hospitable interpretation" by the Fifth Circuit that was contemplated in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 141 (1967), although the Fifth Circuit also quoted briefly from that decision. (App. A at A12.) Petitioners assert that herein, even more than

in *Overton Park*, the Secretary (and the reviewing Courts) had law to apply. In this regard, 7 U.S.C. §602 (App. I at A308, A309) elaborates at some length concerning the policy and purposes of the Act.

Though the Fifth Circuit recognized that there was law to apply on the question of whether the proposed Order tended to effectuate the Act's policy, the Court concluded that no law existed in regard to the "only practical means" decision under Subsection 9(B). This result was achieved chiefly by the Court characterizing the hearing in question as the "tendency" hearing and deciding the Act does not permit or envisage any "additional" factual evidence or findings. (App. A at A14, A15.) As previously pointed out, such reasoning ignores the Congressional design that under Subsections 4 and 9 such determinations are to be made subsequent to the mandatory hearing; and there is no basis for concluding that this hearing was limited solely to the "tendency" issue.

In *Overton Park* the only hearing required under the statutes involved was to be conducted by local officials for the purposes of informing a community about a proposed highway project and eliciting community views on the design and route. It was not designed to produce a record that was to be the basis of agency action, and the substantial evidence test was held not to be an appropriate standard for review. 401 U.S. at 414, 415. In this respect Petitioners find that *Overton Park* is not analogous to the case at bar. At least one record hearing is expressly mandated by the statutory scheme under consideration herein. But in regard to the initial question of whether judicial review is not available because committed to agency discretion, Petitioners submit that the *Overton Park* decision is very relevant. *Id.* at 410-413.

Of course, the tenets and tests in the area of judicial review of administrative decisions are necessarily couched in somewhat broad terms; and the application of such guidelines to various federal acts, involving highly diverse statutory schemes, often presents difficulties. Nevertheless, Petitioners believe that the Fifth Circuit's analysis in this case does not apply the teachings of *Overton Park* with sufficient fidelity in ascertaining if and how these determinations should be judicially reviewed.

The Fifth Circuit's reliance on 7 U.S.C. §608c(15) is not well taken. (App. A at A16, A17.) Subsection 15 expressly authorizes a judicial examination as to whether the order was issued "in accordance with law". (App. I at A331, A332.) Patently, any and all of the complaints Petitioners are making in the present case are included within the ambit of the "in accordance with law" question. Yet even if this were not so, Petitioners would still be entitled to one or both of the types of review which they seek. Nor is the apparent reliance of the Court below on *Stark v. Wickard*, 321 U.S. 288 (1944), justified. As Petitioners read *Stark*, it supports their arguments and indicates that they are entitled to this judicial review, with or without Subsection 15.

Petitioners conclude that the Subsection 9 determinations by the Secretary are subject to judicial review on either the "substantial evidence" standard or the "arbitrary, capricious or abuse of discretion" standard, or on both standards. They believe that Congress intended that these decisions be made on the basis of the evidence taken at the original hearing, but if not made on that record, the Act requires, at least impliedly, that a further hearing be conducted, perhaps augmenting and supplementing the evidence received at the first. Petitioners further conclude that even if the substantial evidence standard is

found for some reason to be inappropriate then, at the very least, these Subsection 9 determinations should be reviewable under the arbitrary, capricious or abuse of discretion criterion.

In addition, the Secretary maintained in the Fifth Circuit that the Subsection 9 determinations had been made in a manner which Petitioners assert was not in compliance with the directives of the Act. Therefore, if Petitioners' reading of the statutory scheme is correct the Order palpably was not made in accordance with the law.

The Court of Appeals said that these decisions could be reviewed for "procedural irregularity or fraud". (App. A at A20.) Petitioners are not certain what the Court would include within the scope of such "procedural irregularity". (See also App. A at A17.) However, it is clear that the Court excluded both a "substantial evidence" and an "arbitrary and capricious" review therefrom.

The Fifth Circuit has misconstrued the statutory scheme in question and has failed to follow the mandates of *Overton Park* concerning the availability of judicial review. Certiorari should be granted to correct these errors involving an important federal Act.

## II.

**The Secretary Erred In Applying A "Domino Concept" In Merging The Corpus Christi Milk Order With The Other Five Orders, And The Fifth Circuit Assented To The Validity And Use Of That Erroneous Concept.**

In forming the new, gigantic milk order in question, encompassing a large part of Texas, the Secretary applied a "domino concept" to justify the merging of the six existing orders. Petitioners contend that to properly include the Corpus Christi Order with the other orders, there must

have been evidence of a substantial interrelationship between the Corpus Christi Order and all of the other five orders.

Under this "domino concept", if there were, for example, an interrelationship between the Corpus Christi and the San Antonio Orders then these two orders should be merged; and if there were also an interrelationship between the San Antonio Order and the Austin-Waco Order, then those two orders should be merged along with the Corpus Christi Order, even though Corpus Christi was related to only one of the other two orders. This specious reasoning would "justify" not only the merger of the six separate Texas orders but the merger into one nation-wide order of all the federal milk marketing orders in the United States, for obviously no order is totally isolated and independent from each and every other market order in the country.

In the segment of the Fifth Circuit's opinion devoted to the review of the Secretary's determination that the merged orders would tend to effectuate the declared policy of the Act, the Court did not explicitly recognize that this question was involved and had been argued to it. Its review was couched in general terms, but the Court did quote a conclusion by the Secretary that "changes in marketing practice since that time (when the six orders were originally promulgated) . . . have caused these separately regulated areas to become substantially interrelated in both the distribution and procurement of milk." (App. A at A10.) This broad conclusion came at the outset of the Secretary's lengthy "Findings and Conclusions" (App. E at A59), but a bit later in the text the Secretary revealed the specific manner in which, at least regarding the Corpus Christi Order, he had reached that broader conclusion.

The Secretary wrote:

> "It is recognized that the Corpus Christi market has little intermarket relationship with some of the other markets to be merged. An extensive interfacing of one market with each of the other five markets is not necessary, however, to justify the six-market merger. For the reasons already described, separate orders for the several areas under consideration are no longer compatible with the current marketing practices in these regulated areas." (App. E at A68.)

In the Court of Appeals, the Secretary argued that this attack by Petitioners on his reasoning was lacking in merit. The Secretary asserted:

> "Therefore, the logic of appellants' argument leads to quite a different conclusion than they would reach. It would merely have required the Secretary first to have combined the other five orders and then to have merged Corpus Christi with the resulting order. This could occur if there were a substantial interrelationship among the five other orders, taken as a group, and Corpus Christi. It would not have required a showing that Corpus Christi was substantially interrelated with each of the other five markets. Collapsing the two steps into one logically is within the parameters of a 'reasoned order.' Accordingly, if there is substantial evidence to support the proposition that the Corpus Christi Order is substantially interrelated with the other five orders, taken as a group, the Secretary's decision should stand." (Secretary's Fifth Circuit Brief at 18, 19.)

Petitioners submit that this passage reflects the erroneous reasoning process which the Secretary has employed, and presumably will continue to employ, when he merges

orders. The Secretary's concept of a "reasoned order" is not reasonable and would permit him to combine a relatively diminutive order with a much larger order simply by finding an interrelationship between the area of the diminutive order and only a small segment of the area encompassed by the larger order. Thus, Petitioners conclude that this procedure, if approved, would enable the promulgation of a milk order covering virtually the entire nation.

Direct decisional authority on this question is sparse. In *United States v. Mills*, 315 F.2d 828 (4th Cir. 1963), *cert. denied*, 374 U.S. 832 (1963), the Court indicated that in determining the boundaries for a milk market order the Secretary must select a practical homogeneous territory of control. 315 F.2d at 835. The Fourth Circuit in *Mills* pointed to the seminal opinion of this Court concerning the Agricultural Marketing Agreement Act of 1937, *United States v. Rock Royal Co-Op*, *supra*, 307 U.S. 533 (1939), in which this Court wrote:

> "The Act authorizes a marketing agreement and order to be issued for such production or marketing regions or areas as are practicable. A city milkshed seems homogeneous. This standard of practicality is a limit on the power to issue orders. It determines when an order may be promulgated." *Id.* at 576.

It is clear, therefore, that the Secretary's authority in establishing the area of a milk order is limited under the Act, and Petitioners submit that when the Secretary has employed the described "domino concept", as he did in this instance, he exceeded such authority. The Court of Appeals assented to and approved such erroneous practice without specific discussion. This matter also involves an important question of federal law and statutory construction; hence, certiorari should be granted to consider and correct this error of the Secretary and the Courts below.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

GARY REAGAN GURWITZ
JOHN BALLARD BENNETT
*(Counsel of Record)*
ATLAS AND HALL
P. O. Drawer 3725
McAllen, Texas 78501
(512) 682-5501
*Attorneys for Petitioners*